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No. 07-1572

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

PINCKNEY A. WOOD,

Petitioner,

versus

BOB DEL GIORNO, WWL AM, AND SINCLAIR COMMUNICATIONS, INC.,

Respondents.

On Petition For Writ Of Certiorari To The Louisiana Court Of Appeal, Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner and Bob Del Giorno, a defendant and employee of the radio-station defendant herein, appeared opposite Petitioner, the president of an animal advocacy group, on a radio talk show to debate the topic of canned hunts. During the course of the show, Del Giorno made seemingly derogatory remarks about Petitioner. Petitioner filed a state law defamation suit in Louisiana state court under Louisiana law. The state district court granted summary judgment to the defendants/respondents, and its ruling was affirmed by the state court of appeal. The questions to be considered by this Court in deciding whether the Louisiana appellate court erred are the following:

1. Were Del Giorno's remarks defamatory?
2. Were Del Giorno's remarks defamatory *per se*?
3. Were Del Giorno's remarks protected expressions of opinion?
4. Was Petitioner prejudiced by procedural error in the courts below?

CORPORATE DISCLOSURE STATEMENT

Respondent, Sinclair Media II, Inc., voluntarily appears herein as the successor of Sinclair Radio of New Orleans, Inc.

Sinclair Media II, Inc. is a wholly owned subsidiary of Sinclair Communications, LLC and an indirect subsidiary of Sinclair Television Group, Inc. and Sinclair Broadcast Group, Inc.

Petitioner named the following defendants in this lawsuit: Bob Del Giorno, WWL AM, and Sinclair Communications, Inc. WWL AM, a radio station, is not a legal entity. In 1997, when Petitioner appeared as a guest on *The André Show*, Sinclair Radio of New Orleans, Inc. (not Sinclair Communications, Inc.) owned the radio station. In August 1998, Sinclair Radio of New Orleans, Inc. merged into Sinclair Radio of New Orleans, LLC, with the limited liability company surviving the merger. In December 2003, Sinclair Radio of New Orleans, LLC merged into Tuscaloosa Broadcasting, Inc., which survived, and in turn, merged into Sinclair Media II, Inc.

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STATEMENT OF THE CASE

A. Facts

This is a state law, civil defamation case.[1] In 1997, petitioner, Pinckney Wood, then acting president of the Coalition of Louisiana Animal Advocates (CLAA), was a guest on *The André Show*, a radio talk show that is broadcast on WWL AM. Mr. Wood claims that he was defamed by a station employee, Bob Del Giorno, who appeared opposite Mr. Wood to present a different viewpoint on "canned hunting," the commercial practice of keeping wild game enclosed on relatively small tracts of land to increase the opportunity for a successful hunt. Heated exchanges and even name-calling are normal on *The André Show* and many other talk shows on radio and cable news networks, and this particular debate on canned hunts was no exception.[2] Both Mr. Wood and Mr. Del Giorno became emotionally charged and animated. Regrettably, Mr. Del Giorno called Mr. Wood an "idiot" and an "absolute fraud" during the show. His behavior was discourteous, but there is no evidence to conclude that anyone listening to the show actually believed Mr. Wood to have diminished intellectual capacity or

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[1] The Louisiana statutes cited in appendix IV of the petition, La. R.S. 14:47, 14:48 and 14:49, are criminal statutes and are not applicable to this case.

[2] Petitioner's reference on p. 7 of his petition to Ms. Trevigne's alleged statement regarding "the most humiliating event" of her career should be stricken and not considered by this Court as it is not in evidence in the proceedings below.

to have engaged in fraudulent behavior. The audience was informed that Mr. Del Giorno did not know Mr. Wood, personally, and that he was not familiar with canned hunts in general or with pending Congressional legislation regarding canned hunts. More importantly, all but one of the listeners who called into the show that day rejected Del Giorno's opinion and chastised him for his "debating style" and for interrupting Mr. Wood. Ironically, if anyone's reputation was injured during the show, it was Bob Del Giorno's. Furthermore, during the show Del Giorno apologized for his emotional outbursts, explaining that he loves to hunt and worries that animal rights groups will succeed in taking that right away from him.

While Mr. Del Giorno's behavior was rude, his words were neither defamatory nor defamatory *per se*. At best, they were protected expressions of opinion uttered by a media defendant, a station employee, about a public figure, the acting president of the Coalition of Louisiana Animal Advocates, regarding a matter of public concern, canned hunting. No evidence suggests that Mr. Del Giorno spoke with actual malice toward Mr. Wood. In fact, Mr. Wood obviously understood the nature of the debate as he made aggressive and threatening moves toward Del Giorno,[3] and he engaged in some name-calling of his

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[3] An audio recording and a written transcript of *The André Show* is in the record below. Petitioner cited to, but did not attach, the transcript to his petition. Respondents have not

(Continued on following page)

own, asserting that Del Giorno was "wasting people's time,"[4] "was a mess,"[5] and was "putting up a smoke-screen"[6] because he did not "know what [he] was talking about."[7]

B. Procedural History

Mr. Wood filed a partial-summary-judgment motion asking the trial court to render judgment on "the fact of defamation," separate and apart from any consideration of pecuniary loss. The defendants/respondents opposed Wood's motion and filed a cross motion for summary judgment asking the court to find that Wood could not meet his burden of proving defamation or any other claims asserted in his petition.[8] The Louisiana state district court heard both

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attached the transcript either, but simply note for the Court that the transcript exists. The cited material is found at page 23, lines 12-18 of the written transcript, noted hereafter as Tr. 23:12-18.

[4] Tr. 8:20-22.

[5] Tr. 9:13.

[6] Tr. 27:14.

[7] Tr. 14:9.

[8] In addition to damages for defamation, Mr. Wood's petition asked for damages for interference with his ability to effectively communicate with the public; interference with the public's "ability to heed what was being said"; defamation of the entire Louisiana humane community; failure to make restitution to both Wood, personally, and to animal protectionists, generally; and failure to inform Wood about a show on this same topic that was broadcast later so that he could provide his views. The petition also asked for a public apology and significant air time,

(Continued on following page)

motions on the same day, March 18, 2005. It rendered judgment on May 12, 2005, denying Mr. Wood's partial-summary-judgment motion and granting the defendants' motion. Mr. Wood appealed both rulings. The Louisiana Court of Appeal for the Fourth Circuit affirmed both rulings, apparently exercising its appellate and supervisory jurisdiction,[9] although Mr. Wood filed but a single appeal. On March 14, 2008, the Louisiana Supreme Court denied Mr. Wood's application for a writ of certiorari.

Mr. Wood then filed a petition for writ of certiorari with this Court on June 11, 2008, which was placed on the docket on June 18, 2008. *The Court should decline to exercise its discretionary jurisdiction because none of the considerations governing review on certiorari are present in this state law defamation case.* When boiled down to its bare bones, Mr. Wood's petition asks this Court to do nothing more than

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to Wood's satisfaction, to make a proper public presentation regarding canned hunts. In his summary-judgment motion, Wood accused Del Giorno of name-calling in violation of Louisiana's statute prohibiting unfair methods of competition, although Wood admitted that he was not soliciting funds for his organization at the time of the broadcast. Wood did not raise these issues in response to the defendants/respondents' summary-judgment-cross motion, or on appeal, or in his writ applications. Therefore, defendants/respondents do not address them here.

[9] Although the Fourth Circuit did not specifically address the procedural issue in the main opinion, Judge Jones noted in his partial concurrence that the court's review of a denial of summary judgment is conducted under its supervisory, not appellate, jurisdiction.

review the Louisiana state court's application of properly stated rules of law to the facts of this case. Due to the chilling effect on free speech, defamation actions are particularly well suited to summary judgment,[10] and this case was no exception. At the time when the Louisiana district and appellate courts were called upon to decide whether Del Giorno's words were defamatory – a purely legal question[11] – no facts were in dispute. In evidence and available to both courts were the written transcript and audiotape of *The André Show*. The courts below correctly applied the law to the facts of this case and concluded that Del Giorno's words were not defamatory. There is no compelling reason for this Honorable Court to revisit the state courts' decisions.

SUMMARY OF THE ARGUMENT

Under Louisiana law, defamation requires proof of four essential legal elements. The initial question is always the same: Were the words defamatory? In this case, the words were regrettable, even insulting, but not defamatory. Taken in the context in which they were spoken – on a radio talk show, which was intended to entertain as well as inform the audience,

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[10] *Kennedy v. Sheriff of East Baton Rouge*, 05-1418 (La. 7/10/06), 935 So.2d 669.

[11] *Costello v. Hardy*, 03-1146 (La. 1/21/04), 864 So.2d 129, 140, citing *Sassone v. Elder*, 626 So.2d 345, 350 (La. 1993).

by a station employee who admittedly knew very little about the subject of canned hunts or pending federal legislation on the subject – the words did not expose Mr. Wood to contempt, hatred, ridicule, or disgrace. Nor did they injure his reputation, occupation, or public standing. At best, Mr. Del Giorno's words were rhetorical hyperbole. Even the most careless listener to the broadcast could not have believed Mr. Wood to be an idiot, a liar, or a fraud.

Moreover, Del Giorno's words were protected expressions of opinion. Although he did not actually say, "In my opinion you are a fraud," the context of the program made clear that Del Giorno was expressing nothing more than his opinion and not a statement of fact. When a statement expresses an opinion, it is not actionable defamation unless it implies a false and libelous fact and it is expressed with malice. The context in which Del Giorno referred to Mr. Wood as an absolute fraud makes clear that Del Giorno was expressing his opinion, not an objective fact, about Wood's knowledge of the attempts being made to regulate canned hunts. Therefore, the words were not defamatory.

Finally, Del Giorno's words were protected speech that are subject to a qualified privilege under the *New York Times Co. v. Sullivan*[12] standard, which requires a finding of actual malice in cases involving

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[12] *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).

statements about public figure plaintiffs. Mr. Wood appeared on *The André Show* in his capacity as president of the CLAA, an organization dedicated to changing public opinion and urging the enactment of laws regarding animal welfare. By choosing to become a public spokesperson about a matter of public concern – canned hunts – Mr. Wood subjected himself to personal challenge and criticism that must be tolerated under the First Amendment guarantee of free speech. Under the standards articulated by this Court in, for example, *Hustler Magazine v. Falwell*,[13] Del Giorno's words may have been false and valueless, yet not malicious due to the First Amendment's "recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern."[14]

The Louisiana Court of Appeal for the Fourth Circuit correctly reviewed and decided the case below. This Court should deny Mr. Wood's petition for writ of certiorari.

LAW AND ARGUMENT

Defamation is a tort that involves the invasion of a person's interest in his or her reputation and good

[13] *Hustler Magazine v. Falwell*, 485 U.S. 46, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988).

[14] *Id.*, 485 U.S. at 50.

name.[15] Under Louisiana law, the plaintiff claiming defamation must establish four essential elements: (1) a false and defamatory statement concerning another; (2) an unprivileged communication to a third party; (3) fault (negligence or greater) on the part of the publisher; and (4) resulting injury.[16] The fault requirement is often described in the Louisiana jurisprudence as malice, actual or implied.[17] Thus, in order to prevail on a defamation claim, the plaintiff must prove that the defendant, acting with actual malice or other fault, published a false statement with defamatory words that caused damages.[18] If even one element is lacking, the cause of action fails.[19]

Defamatory words are those that tend to harm the reputation of another by lowering the community's estimation of the person, to deter others from associating or dealing with the person, or to expose a person to contempt or ridicule.[20] In some cases, even if words might otherwise be defamatory, recovery is precluded if the defendant is able to show either that the statement was true or that it was protected by a

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[15] *Costello v. Hardy*, 03-1146 (La. 1/21/04), 864 So.2d 129, 139.

[16] *Id.*

[17] *Id.*

[18] *Id.* at 139-40.

[19] *Id.* at 140.

[20] *Id.*, citing *Fitzgerald v. Tucker*, 98-2313 (La. 6/29/99), 737 So.2d 706, 716, and *Trentecosta v. Beck*, 96-2388 (La. 10/21/97), 703 So.2d 552, 559.

privilege.[21] In this case, the words uttered by Del Giorno were not defamatory. But even if Del Giorno's utterances were defamatory, they are protected speech and, thus, are not actionable defamation.

A. Del Giorno's words were neither defamatory nor defamatory *per se*.

Words are defamatory if they "tend to expose a person to contempt, hatred, ridicule, or disgrace, or to injure him in his reputation, occupation, or public standing."[22] The intent and meaning of the alleged defamatory statement must be gathered from the context as well as the words, and all parts of the statement and the circumstances of its publication must be considered to derive the true meaning.[23] The test is the effect of the statement *on those whom it was intended to reach*.[24] In this case, and conceding that the plaintiff was treated badly, the context reveals that he was *not* defamed.

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[21] *Doe v. Grant*, 01-0175 (La.App. 4th Cir. 1/29/03), 839 So.2d 408, 416, *writ denied*, 03-0604 (La. 5/2/03), 842 So.2d 1102.

[22] *Fourcade v. City of Gretna*, 91-CA-957 (La.App. 5th Cir. 3/31/92), 598 So.2d 415; *Cashio v. Holt*, 425 So.2d 820 (La.App. 5th Cir. 1982), *writ denied*, 430 So.2d 94 (La. 1983); *Weatherall v. Dep't of Health & Human Resources*, 432 So.2d 988 (La.App. 1st Cir. 1983), *writ denied*, 437 So.2d 1150 (La. 1983); *Brown v. News-World Publ'g Corp.*, 245 So.2d 430 (La.App. 2d Cir. 1971).

[23] *Brown*, 245 So.2d 430; *Davis v. Southern Sav. Ass'n*, 557 So.2d 1011 (La.App. 4th Cir. 1990).

[24] *Brown*, 245 So.2d 430.

Regrettably, Del Giorno called Mr. Wood both an "absolute fraud" and an "idiot" during the radio show. However, due to the nature of the radio talk show, there is no basis for asserting that any listener of ordinary intelligence or sensibility could have believed that Mr. Wood was guilty of the crime of fraud or of dishonest business practices. Certainly, no one listening actually believed that Mr. Wood was a person of diminished intellectual capacity. The context in which the words were spoken makes clear that they were not taken literally by the audience. The audience was informed that Mr. Del Giorno did not know Mr. Wood[25] and that he was not familiar with pending Congressional legislation on canned hunts.[26] The audience clearly was advised that Del Giorno was not an expert on the topic of canned hunts, thereby undercutting any conclusion Del Giorno may have reached regarding Mr. Wood's qualifications or knowledge about the subject. More importantly, all but one of the listeners who called into the show that day rejected Del Giorno's opinion and chastised him for his "debating style" and for interrupting Mr. Wood.[27] Ironically, if anyone was "exposed to contempt, hatred, ridicule, or disgrace" or was "injured in his reputation, occupation, or public standing," it was Bob Del Giorno, not Mr. Wood. Furthermore, during

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[25] Tr. 3:14-15.

[26] Tr. 3:23-25.

[27] Tr. 11:8-9; 17:20-21; pp. 20-23; 24:21-22; 28:2-8; 31:25 through 32:17.

the show, Del Giorno apologized for his emotional outbursts, explaining that he loves to hunt and is concerned that animal rights groups will succeed in taking that away from him.[28] Finally, despite having asserted conclusory allegations of injury, Mr. Wood offered no proof in opposition to defendants' summary-judgment motion that he was damaged, monetarily or in any other way – one of the essential elements of a defamation claim. In fact, he conceded in his writ application to the Louisiana appeals court that his alleged injury "may not have significance in terms of monetary considerations."[29] Monetary considerations aside, Mr. Wood offered no *prima facie* proof to create an issue of fact in the courts below that he suffered damage of any kind – to his reputation, his business, his ability to fund-raise. Nevertheless, he continues to make conclusory assertions to this Court that he has been damaged in ways that he failed to prove in the courts below.

Petitioner also argues that Mr. Del Giorno's words are defamatory *per se*, *i.e.*, words that by themselves, without considering extrinsic facts and circumstances, result in "contempt, hatred, ridicule, disgrace" or injure a person in his "reputation, occupation, or public standing." The significance of the *per se* classification

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[28] Tr. 31:14.

[29] Respondents have not attached a copy of Mr. Wood's writ application to the Louisiana Court of Appeal for the Fourth Circuit, but simply note that the quoted language is found at p. 6 of the application, which forms a part of the record below.

is that, in a matter governed solely by state law (*i.e.*, the classic common law defamation claim), words that are defamatory *per se* can give rise to a presumption of falsity and malice, thereby shifting the burden to the defendant to rebut the presumption. But even a finding of defamation *per se* is not, as Mr. Wood seems to suggest, all that is required to establish liability even in a classic common law defamation case. In any event, in this case, Mr. Del Giorno's lapse of courtesy clearly did not amount to defamation *per se*, and his words were nothing more than rhetorical hyperbole. Hyperbole cannot reasonably be interpreted as stating an actual fact.

In *Greenbelt Cooperative Publishing Ass'n v. Bresler*,[30] a real estate developer engaged in negotiations with a local city council for a zoning variance over certain property he owned while simultaneously negotiating the sale to the city of other property he owned. A newspaper published comments calling the developer's negotiating position "blackmail." This Court rejected the developer's contention that liability could be premised solely on the use of the word "blackmail." Under these circumstances, the *Greenbelt* Court reasoned that no one could have believed that the use of the word meant the developer committed the crime of blackmail: "even the most careless reader must have perceived that the word was no

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[30] *Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6, 90 S.Ct. 1537, 26 L.Ed.2d 6 (1970).

more than rhetorical hyperbole, a vigorous epithet used by those who considered [the developer's] negotiating position extremely unreasonable."[31] Similarly, in *Letter Carriers v. Austin*,[32] this Court found that use of the word "traitor" to define a union "scab" did not present a sufficient basis for a defamation action under federal labor law since the term was used in a "loose, figurative" sense and was "merely rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members." Clearly, Del Giorno's words amounted to nothing more than rhetorical hyperbole – a lusty and imaginative expression of the contempt he felt for those whom he feared might be threatening his right to hunt – and were not sufficient to constitute defamation.

B. Del Giorno's words were protected expressions of opinion.

Courts recognize the inherent differences between statements of fact and statements of opinion, and when considering defamation claims, courts distinguish between the two due to the importance of

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[31] *Id.*, 398 U.S. at 13-14. *See also, Hustler Magazine v. Falwell*, 485 U.S. 46, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988) (First Amendment precluded recovery under state emotional distress action for ad parody which "could not reasonably have been interpreted as stating actual facts about the public figure involved").

[32] *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers, AFL-CIO v. Austin*, 418 U.S. 264, 94 S.Ct. 2770, 41 L.Ed.2d 745 (1974).

conjecture to free speech.[33] If a statement expresses an opinion, the words are not actionable defamation unless the opinion implies a false and libelous fact, and the opinion is expressed with actual malice.[34] The context in which a statement is made is critical to determining whether it is one of fact or merely opinion. In *Mashburn v. Collin*,[35] the Louisiana Supreme Court discussed at length what constitutes "fair comment," writing that "the crucial difference between statements of fact and opinion depends upon whether ordinary persons hearing or reading the matter complained of would be likely to understand it as a statement of existing fact."[36] *Mashburn* involved a food critic's scathing review of a restaurant. The court found that the critic's comments were not defamatory, given that the defendant had actually eaten at the restaurant and that his review implied no unstated facts, such as the restaurant's sanitary condition, to justify the opinion. Similarly, Del Giorno's comments about Mr. Wood did not imply any false or libelous facts to substantiate his opinion. In fact, the audience was advised that Del Giorno's opinion was based on a very limited review of the

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[33] *See, Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990) and *Mashburn v. Collin*, 355 So.2d 879 (La. 1977).

[34] *See, Bussie v. Lowenthal*, 535 So.2d 378 (La. 1988) and *Lee v. Woodley*, 615 So.2d 349 (La.App. 1st Cir. 1993), *writ denied*, 618 So.2d 411 (La. 1993).

[35] *Mashburn*, 355 So.2d 879.

[36] *Id.* at 885.

relevant documents and limited knowledge of the topic, leaving the listener to decide for himself whether Mr. Wood or Del Giorno was correct. Thus, the context in which Del Giorno called Mr. Wood a liar and a fraud makes clear that Del Giorno was merely expressing his personal opinion, unsupported by any false or libelous facts, regarding Wood's position on the attempts being made to regulate canned hunts. As such, Del Giorno's comments are protected expressions of opinion and are, therefore, exempt from a claim of defamation regardless of how insulting they may have been to Mr. Wood.

C. Del Giorno's speech is subject to a qualified privilege under *New York Times Co. v. Sullivan*.

Del Giorno's speech is protected by a qualified privilege under *New York Times Co. v. Sullivan*,[37] which balances the freedom of expression against the right to defend against defamation. *Sullivan* held that a plaintiff must prove actual malice, *i.e.*, that the defendant either knew the statement was false or acted with reckless disregard for the truth,[38] in cases involving statements about a public figure. In the cases that followed *Sullivan*, this Court expanded the

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[37] *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).

[38] *Id.* at 376 U.S. 283.

privilege from "public officials" to "public figures," including "limited purpose public figures."[39]

1. Petitioner is a public figure.

A limited purpose public figure is one who voluntarily injects himself into a particular public controversy and becomes a public figure in connection with that controversy by "inviting attention and comment."[40] Applying a label, such as "public figure," is a conclusion of law to be decided by the court based on the facts before it.[41] The Louisiana appeals court correctly concluded that Wood became a limited purpose public figure when he contacted *The André Show* seeking to appear in his capacity as president of the CLAA – an organization dedicated to changing public opinion and urging the enactment of laws – to debate the controversial topic of canned hunts. Contrary to Mr. Wood's assertion, he is not completely immune from having his credentials, character, motives, or reputation challenged just because he is a knowledgeable and sincere advocate of animal rights. By choosing to become a public spokesman for a matter of concern, he subjected himself to such attacks as a matter of law.

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[39] *See Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967) and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974).

[40] *See Trotter v. Jack Anderson Enterprises, Inc.*, 818 F.2d 531 (5th Cir. 1987).

[41] *See Gertz*, 418 U.S. 323.

2. All respondents are "media defendants."

Petitioner argues that defendant Bob Del Giorno is not entitled to immunity from claims of defamation because he is not a media defendant. Whether Del Giorno was acting within the course and scope of his employment while a guest on the radio show raises interesting issues regarding the proper foundation required to invoke the constitutional privilege. Defendants have been unable to find any Supreme Court cases decided in the decades since *Sullivan* that provide clarity on the issue of media and non-media defendants. Nevertheless, since the First Amendment protects both free *speech* and a free *press*, it is not unreasonable to conclude that the *Sullivan* standard applies to non-media defendants as well.[42] As suggested by various scholars, the core question is whether the speech involves a matter of public concern.[43] As such, there was no need for the courts below to decide whether Del Giorno was or was

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[42] *See Bussie v. Larson*, 501 F.Supp. 1107 (M.D. La. 1980) and *Wattigny v. Lambert*, 453 So.2d 1272 (La.App. 3d Cir. 1984), *writ denied*, 493 So.2d 1221 (La. 1986).

[43] *See*, Maraist and Galligan, *Louisiana Tort Law*, Second Ed., § 19.02[8]. *See also, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985) (involving a private figure plaintiff, a non media defendant, and a matter of private concern in which Court recognized danger of "chilling effect" on free speech inherent in any defamation claim); and *Trentecosta v. Beck*, 96-2388 (La. 10/21/97), 703 So.2d 552 (La. 1997) (recognizing qualified privilege for fair reporting of investigations or arrests to the press, and in turn, to the public).

not a media defendant, and they did not make any finding regarding his status. In the absence of such need, there is no material factual dispute as to his status that would have precluded summary judgment.

Alternatively, the defendants invite this Court to accept plaintiff's version of the facts, and then consider whether, as a matter of law, Del Giorno was acting as an employee of WWL AM. Clearly, he was. Del Giorno was not commanded by his employer to appear on *The André Show*, but he was acting as an employee of the station. An employee is generally considered to be in the course and scope of his employment if the conduct in question is of the character and nature that he is employed to perform, and it occurs substantially within the authorized limits of time and space, and it is activated at least in part by a purpose to serve the employer.[44] Del Giorno's participation in *The André Show* was similar in character and nature to what he was employed to do as a broadcast journalist. The broadcast originated from his normal place of employment during normal

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[44] *Brasseaux v. Town of Mamou*, 99-1584 (La. 1/19/00), 752 So.2d 815. *See also, Faust v. Greater Lakeside Corp.*, 98-2853 (La.App. 4th Cir. 9/12/01), 797 So.2d 748, *writ denied*, 01-3149 (La. 2/1/02), 808 So.2d 343; *Harrington v. La. State Bd. of Elementary and Secondary Educ.*, 97-1670 (La.App. 4th Cir. 5/20/98), 714 So.2d 845, *writ denied*, 98-2170 (La. 11/20/98), 728 So.2d 1287; and *Fallon v. Sullivan*, 94-1927 (La.App. 4th Cir. 2/23/95), 650 So.2d 1232, *writ denied*, 95-0769 (La. 4/28/95), 653 So.2d 601.

work hours. And his appearance was motivated, at least in part, to serve his employer by providing the show with a guest having a different point of view than plaintiff. It is simply unreasonable to conclude that Del Giorno is not a media defendant. Whether Del Giorno is or is not a media defendant, however, is not necessary to the outcome of the case because, first, petitioner was not defamed and, second, the same First Amendment considerations are applicable when matters of public concern are involved, whether or not Del Giorno is a media defendant.

3. Canned hunts are a matter of public concern.

Mr. Wood's decision to become involved in a matter of public concern subjected him to abuses that must be tolerated to protect First Amendment guarantees of free speech. As noted in the *Sullivan* case, our country has made a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[45] That the subject of canned hunts was a public issue is evidenced by the number of listeners who called into the show to comment and by the number of volunteers, led by Mr. Wood, who work tirelessly to cause legislation to be

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[45] *Sullivan*, 376 U.S. at 270; 84 S.Ct. at 721.

enacted to prevent cruelty to animals. As the relevant facts regarding Mr. Wood's status as a limited public figure and the status of canned hunts as a public issue were not in dispute, this case was ripe for summary judgment using the actual malice standard of *Sullivan*.

4. Petitioner did not meet his burden of proving that Bob Del Giorno's words were spoken with "actual malice."

Summary judgment is encouraged in defamation cases because of the high standard of proof required, *i.e.*, actual malice, which must be shown with "convincing clarity" (in other words, by clear and convincing evidence), and because of the chilling effect that protracted litigation has on First Amendment rights.[46] Mr. Wood presented no evidence, let alone clear and convincing evidence, that Del Giorno acted with actual malice. Therefore, summary judgment was appropriate.

The crux of Mr. Wood's argument is that hyperbole without humor is not hyperbole, and since Del Giorno was not being humorous when he exclaimed that Mr. Wood was a fraud and a liar, then by definition Del Giorno acted with actual malice. The fallacy of Mr. Wood's argument is perhaps best illustrated by considering the case of *Hustler Magazine v.*

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[46] *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

Falwell.[47] Hustler Magazine published an advertising parody of a then popular advertising campaign by a liquor distributor in which the Rev. Jerry Falwell appeared to have said during an interview that he had engaged in a drunken incestuous relationship with his mother. Hustler deliberately fabricated the entire interview and no one at Hustler deemed the statements to be true. To the contrary, the statements were known to be false when published; thus, they were made with actual knowledge of their falsity and not mere reckless disregard for the truth.

This Court held that the First Amendment prohibited damages for defamation or intentional infliction of emotional distress under the facts of the case, writing that at "the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern."[48] The Court further noted that, although false statements of fact are "valueless," "interfere with the truth-seeking function of the marketplace of ideas," and may "cause damage to a person's reputation that cannot easily be repaired by counterspeech, however persuasive or effective," "*freedoms of expression require 'breathing space.'*"[49]

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[47] *Hustler Magazine v. Falwell*, 485 U.S. 46, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988).

[48] *Id.*, 485 U.S. at 50.

[49] *Id.*, 485 U.S. at 52, citing *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 772, 106 S.Ct. 1558, 1561, 89 L.Ed.2d 783 (1986) (quoting *Sullivan*, 376 U.S. at 272).

(Emphasis added.) The Court acknowledged that its decision meant "outrageous" things could be said by those whose motives were "less than admirable," but concluded that a speaker or writer is protected by the First Amendment even when he is "motivated by hatred or ill will."[50] Under this standard, even if Mr. Wood was the victim of an outrageous attack, it is clear that First Amendment interests of freedom of speech and press are entitled to greater protection even if only to give sufficient breathing room to the debate. The courts below, which had in evidence the audio recording and written transcript of the show, correctly found that Del Giorno acted without malice when expressing his opinions about Mr. Wood.

D. Petitioner was not the victim of procedural errors below.

Although Petitioner does not include in his questions presented for review the subject of perceived procedural errors, he raises the issue, which he also raised in the courts below, in the text of his petition.[51] The gist of Mr. Wood's argument is that he lost a procedural advantage by having the motions for summary judgment, his motion and defendants' motion, heard at the same time.

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[50] *Id.*, 485 U.S. at 53.

[51] Petition, pp. 8-10.

1. Discovery was complete.

Mr. Wood suggests that summary judgment was not appropriate because discovery was incomplete. The trial court and the appeals court correctly found that Mr. Wood failed to show that further discovery would have produced any new evidence creating an issue of fact. He failed to avail himself of the procedural safeguards for postponing premature motions based on the need for additional discovery,[52] and he did not inform the court of the specific discovery he needed to respond to defendants' motion. Instead of specifically setting forth his needs, plaintiff simply complained that defendants had objected to some of his interrogatories and had ignored his request that André Trevigne (a non-party to the suit) answer certain interrogatories. He also complained that the answers were defective because they were signed by counsel rather than the persons providing the information. His failure to avail himself of the appropriate procedural safeguards constitutes a waiver of the right to complain about the rendition of summary judgment based on incomplete discovery.[53] Moreover, Mr. Wood had ample time -- more than three years –

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[52] La. Code Civ. P. art. 967(D).

[53] *Armstead v. Schwegmann Giant Supermarkets, Inc.*, 618 So.2d 1140 (La.App. 4th Cir. 1993), *writ denied*, 629 So.2d 347 (La. 1993), and *Spellman v. Peoples Bank and Trust Co. of St. Bernard*, 544 So.2d 10 (La.App. 4th Cir. 1989), *writ denied*, 548 So.2d 327 (La. 1989).

to compel discovery, but never did.[54] *Above all*, neither the trial court nor the court of appeal relied on any interrogatory answers in ruling on the cross motions for summary judgment. In this case, there was in evidence a transcript as well as an audio recording of the radio talk show that gave rise to this lawsuit. Thus, the courts below had all of the relevant facts at their disposal – that is the written words as well as the actual context in which those words were spoken, including inflection and tone of voice – when reviewing the evidence and deciding whether summary judgment was appropriate.

2. Petitioner lost no "procedural advantage" by having the cross-motions heard at the same time.

Mr. Wood contends that he was prejudiced by having his motion heard at the same time as defendants' motion. The trial court properly exercised its discretion to hear the motions together to promote judicial economy and efficiency. Despite petitioner's insistence that, had his motion been heard first, he would have won on the issue of defamation *per se*, which he claims inevitably would have led to the

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[54] *Armstead*, 618 So.2d 1140 (plaintiff had ample opportunity to conduct discovery when summary-judgment motion filed one year after petition). In this case, the petition was filed on October 23, 1998 and plaintiff filed his summary-judgment motion on December 2, 2004; thus, he had more than six years to conduct discovery in this case.

imposition of damages, there is no reason to believe that the outcome would have been any different if the judge had held two separate hearings. Plaintiff would not have avoided having to address the First Amendment issues raised by defendants in opposition to plaintiff's motion. As the Court is well aware, great deference is accorded to a trial court's discretion to control its docket and its ruling should not be disturbed absent an abuse of discretion. No such abuse is present here.

3. Petitioner's due process rights were satisfied.

Mr. Wood contends that he was not afforded a proper hearing. Specifically, he complains that the judge did not allow sufficient time for oral argument and that the judge did not hear *any* argument on defendants' motion for summary judgment, which, Mr. Wood says, prevented him from responding to defendants' arguments. Of course, there is no right to orally argue a motion for summary judgment. Likewise, litigants have no right to talk as long as they want. Mr. Wood's due process rights to be "heard" were satisfied by filing an extensive opposition brief with the court. This argument has no merit.

CONCLUSION

This Court should decline to exercise its discretionary jurisdiction because none of the considerations governing review on certiorari are present in this state law defamation case. The Court should deny the petition for writ of certiorari.

Respectfully submitted,

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